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8 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
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10 CHARQUELLA D. GARDNER,

11 Plaintiff,

12 v.

13 NANCY A. BERRYHILL, Deputy
14 Commissioner of the Social Security
Administration for Operations,

15 Defendant.
16

CASE NO. 2:17-CV-00941-JRC

ORDER ON PLAINTIFF'S
COMPLAINT

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18 This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and
19 Local Magistrate Judge Rule MJR 13 (*see also* Consent to Proceed Before a United
20 States Magistrate Judge, Dkt. 2). This matter has been fully briefed. *See* Dkt. 12, 15, 16.

21 After considering and reviewing the record, the Court concludes that the ALJ
22 erred when evaluating the medical evidence: although the ALJ gave "great weight" to the
23 opinion from a particular examining psychologist, the ALJ failed to acknowledge, or
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1 explain why she did not credit fully, the opinion from this doctor that plaintiff potentially
2 suffered from a disabling limitation and that she needed to be properly encouraged and
3 taught before she could develop the ability to maintain employment. Therefore, this
4 matter is reversed and remanded to the Acting Commissioner for further consideration
5 consistent with this order.

6 BACKGROUND

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8 Plaintiff, CHARQUELLA D. GARDNER, was born in 1993 and was 19 years old
9 on the alleged date of disability onset of August 1, 2012. *See* AR. 15, 281-89. Plaintiff
10 obtained her diploma after getting her final credit at a community college. AR. 40.
11 Plaintiff has some work history in fast food restaurants, as a cashier and running carnival
12 rides. AR. 421-25. Plaintiff was last employed housekeeping, but was fired for not
13 showing up and getting into an argument with the supervisor. AR. 41-42.

14 According to the ALJ, plaintiff has at least the severe impairments of “learning
15 disorder NOS, borderline intellectual functioning, affective disorder, and anxiety-related
16 disorder (20 CFR 416.920(c)).” AR. 17.

17 At the time of the hearing, plaintiff was living in an apartment with her disabled
18 mother. AR. 40-41.

19 PROCEDURAL HISTORY

20 Plaintiff’s application for Supplemental Security Income (“SSI”) benefits pursuant
21 to 42 U.S.C. § 1382(a) (Title XVI) of the Social Security Act was denied initially and
22 following reconsideration. *See* AR. 87-98, 100-113. Plaintiff’s requested hearing was
23 held before Administrative Law Judge Irene Sloan (“the ALJ”) on February 10, 2016. *See*
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1 AR. 35-63. On March 18, 2016, the ALJ issued a written decision in which the ALJ
2 concluded that plaintiff was not disabled pursuant to the Social Security Act. *See* AR. 12-
3 34.

4 In plaintiff's Opening Brief, plaintiff raises the following issues: (1) Whether the
5 ALJ erred in failing to properly consider the opinions of the examining providers in the
6 record and in failing to provide adequate explanation for not according those opinions
7 more weight; and (2) Whether the ALJ's adopted residual functional capacity, finding
8 that the plaintiff is capable of work that is simple with no limits on interactions with
9 supervisors and coworkers, is supported by substantial evidence in the record. *See* Dkt.
10 12, p. 2.

12 STANDARD OF REVIEW

13 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's
14 denial of social security benefits if the ALJ's findings are based on legal error or not
15 supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d
16 1211, 1214 n.1 (9th Cir. 2005) (*citing Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir.
17 1999)).

18 DISCUSSION

19 (1) **Whether the ALJ erred in failing to properly consider the opinions of** 20 **the examining providers in the record.**

21 Plaintiff contends that the ALJ erred when considering the medical opinions, such
22 as the medical opinion from the examining doctor, Dr. Patricia Fantoni-Salvador, Ph.D.
23 *See* Dkt. 12, pp. 7-9. Defendant contends that there is no error. *See* Dkt. 15, pp. 3-4.

1 When an opinion from an examining doctor is contradicted by other medical
2 opinions, the examining doctor's opinion can be rejected only "for specific and legitimate
3 reasons that are supported by substantial evidence in the record." *Lester v. Chater*, 81
4 F.3d 821, 830-31 (9th Cir. 1996) (citing *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir.
5 1995); *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)); *see also* 20 C.F.R. §§
6 404.1527(a)(2) ("Medical opinions are statements from physicians and psychologists or
7 other acceptable medical sources that reflect judgments about the nature and severity of
8 your impairment(s), including your symptoms, diagnosis and prognosis, what you can
9 still do despite impairment(s), and your physical or mental restrictions").
10

11 Here, when discussing the medical opinions, the ALJ gave "great weight to the
12 consultative psychological evaluation by examining physician, Patricia Fantoni-Salvador,
13 Ph.D. (internal citation to AR. 492-96) because her opinion was based on objective
14 quantifiable testing, not just on the claimant's subjective complaints." AR. 25 (other
15 citations omitted). Based on this set of conclusions, the ALJ implied that all of the
16 opinions from this doctor were accepted into the residual functional capacity ("RFC") as
17 determined by the ALJ in the written decision. However, as noted by plaintiff, not all of
18 her opinions are reflected in the ALJ's RFC.
19

20 According to Social Security Ruling ("SSR") 96-8p, a residual functional capacity
21 assessment by the ALJ "must always consider and address medical source opinions. If the
22 RFC assessment conflicts with an opinion from a medical source, the adjudicator must
23 explain why the opinion was not adopted." *See* SSR 96-8p, 1996 SSR LEXIS 5 at *20.
24 Although "Social Security Rulings do not have the force of law, [n]evertheless, they

1 constitute Social Security Administration interpretations of the statute it administers and
2 of its own regulations.” See *Quang Van Han v. Bowen*, 882 F.2d 1453, 1457 (9th Cir.
3 1989) (citing *Paxton v. Sec. HHS*, 865 F.2d 1352, 1356 (9th Cir. 1988); *Paulson v.*
4 *Bowen*, 836 F.2d 1249, 1252 n.2 (9th Cir. 1988)) (internal citation and footnote omitted).
5 As stated by the Ninth Circuit, “we defer to Social Security Rulings unless they are
6 plainly erroneous or inconsistent with the [Social Security] Act or regulations.” *Id.* (citing
7 *Chevron USA, Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-45 (1984); *Paxton, supra*, 865 F.2d
8 at 1356) (footnote omitted). Here, this Ruling that an ALJ must explain why a medical
9 opinion is not adopted into an RFC is not plainly erroneous or inconsistent with the
10 Social Security Act or regulations.
11

12 Dr. Fantoni-Salvador provided a number of opinions, however, the ALJ noted the
13 ones that supported the ALJ’s RFC, and not the ones that did not. For example, as noted
14 by plaintiff, when examining, performing comprehensive testing of, and assessing
15 plaintiff, Dr. Fantoni-Salvador opined that plaintiff “presented with deficits in attention
16 and concentration ... [and] seemed unfocused throughout the session ... [and] her mood
17 was somewhat depressed and her affect blunted.” AR. 493-94. Dr. Fantoni-Salvador also
18 noted that plaintiff “behaves immaturely with peers, [and] figures of authority, [and]
19 exhibits anxiety symptoms, helplessness, low motivation and marginal adaptive
20 functioning. **If properly encouraged and taught**, she may develop the ability to become
21 appropriately self-sufficient and successfully obtain and maintain unskilled to skilled
22 employment.” AR. 495 (emphasis added).
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1 Here, the ALJ erred by failing to note that Dr. Fantoni-Salvador clearly was of the
2 opinion that plaintiff contemporaneously was not yet “appropriately self-sufficient” as
3 she still needed to develop this ability. *See id.* Defendant contends that plaintiff’s
4 argument is only a different way to interpret the record, and that it is not clear that the
5 doctor opined that plaintiff was not capable of full-time employment. *See* Dkt. 15, p. 4.

6 As noted, the relevant opinion is: “**If properly encouraged and taught**, she may
7 develop the ability to become appropriately self-sufficient and successfully obtain and
8 maintain unskilled to skilled employment.” AR. 496 (emphasis added). There is only one
9 logical way to interpret this phrase: if a certain condition were to occur, (obviously, a
10 condition that does not yet exist), then a certain result potentially could occur. *See id.*
11 That condition, that does not yet exist, is the condition of plaintiff having been “properly
12 encouraged and taught.” *See id.* As it does not appear that the ALJ or defendant cited any
13 evidence in the record that plaintiff has been “properly encouraged and taught,” it is not
14 simply a different interpretation of the record as to whether Dr. Fantoni-Salvador was of
15 the opinion that plaintiff could work at that time.

16 For the reasons stated, and based on the record as a whole, Court concludes that
17 the ALJ erred when failing to acknowledge the opinion of Dr. Fantoni-Salvador that
18 plaintiff potentially suffered from a disabling limitation. The ALJ also erred when failing
19 to explain why the opinion was not adopted into the RFC, *see* SSR 96-8p, 1996 SSR
20 LEXIS 5 at *20, and by failing to provide a specific and legitimate reason based on
21 substantial evidence in the record as a whole for this failure. *See Lester*, 81 F.3d at 830-
22 31 (citing *Andrews*, 53 F.3d at 1043).

1 Defendant contends that the error is harmless,

2 The Ninth Circuit has “recognized that harmless error principles apply in the
3 Social Security Act context.” *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012)
4 (citing *Stout v. Commissioner, Social Security Administration*, 454 F.3d 1050, 1054 (9th
5 Cir. 2006) (collecting cases)). The Ninth Circuit has reaffirmed the explanation in *Stout*
6 that “ALJ errors in social security are harmless if they are ‘inconsequential to the ultimate
7 nondisability determination’ and that ‘a reviewing court cannot consider [an] error
8 harmless unless it can confidently conclude that no reasonable ALJ, when fully crediting
9 the testimony, could have reached a different disability determination.’” *Marsh v. Colvin*,
10 792 F.3d 1170, 1173 (9th Cir. 2015) (citing *Stout*, 454 F.3d at 1055-56). The court further
11 indicated that “the more serious the ALJ’s error, the more difficult it should be to show
12 the error was harmless.” *Id.* at 792 F.3d 1170 (noting that where the ALJ did not even
13 mention a doctor’s opinion that plaintiff was “pretty much nonfunctional,” it could not
14 “confidently conclude” that the error was harmless) (citing *Stout*, 454 F.3d at 1056;
15 *Bowen v. Comm’r of Soc. Sec.*, 478 F.3d 742, 750 (6th Cir. 2007)). In *Marsh*, even
16 though “the district court gave persuasive reasons to determine harmlessness,” the Ninth
17 Circuit reversed and remanded for further administrative proceedings, noting that “the
18 decision on disability rests with the ALJ and the Commissioner of the Social Security
19 Administration in the first instance, not with a district court.” *Id.* (citing 20 C.F.R. §
20 404.1527(d)(1)-(3)).
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1 Here, as already discussed, it is relatively clear that Dr. Fantoni-Salvador was of
2 the opinion that plaintiff suffered from a disabling limitation, *see supra*, hence crediting
3 in full this opinion would lead to a finding of disability. Therefore, the Court cannot
4 conclude with confidence ““that no reasonable ALJ, when fully crediting the testimony,
5 could have reached a different disability determination.”” *Marsh*, 792 F.3d at 1173 (citing
6 *Stout*, 454 F.3d at 1055-56).

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8 However, regarding plaintiff’s request for application of the credit-as-true
9 standard, whereby rejected medical opinions are credited as if they were fully adopted,
10 the Court concludes that it is not appropriate here.

11 Generally, when the Social Security Administration does not determine a
12 claimant’s application properly, ““the proper course, except in rare circumstances, is to
13 remand to the agency for additional investigation or explanation.”” *Benecke v. Barnhart*,
14 379 F.3d 587, 595 (9th Cir. 2004) (citations omitted). However, the Ninth Circuit has put
15 forth a “test for determining when [improperly rejected] evidence should be credited and
16 an immediate award of benefits directed.” *Harman v. Apfel*, 211 F.3d 1172, 1178 (9th
17 Cir. 2000) (quoting *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996)).

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19 It is appropriate when:

20 (1) the ALJ has failed to provide legally sufficient reasons for rejecting
21 such evidence, (2) there are no outstanding issues that must be resolved
22 before a determination of disability can be made, and (3) it is clear from
the record that the ALJ would be required to find the claimant disabled
were such evidence credited.

23 *Harman, supra*, 211 F.3d at 1178 (quoting *Smolen, supra*, 80 F.3d at 1292).

1 Here, outstanding issues must be resolved. *See Treichler v. Comm’r of Soc. Sec.*
2 *Admin.*, 775 F.3d 1090, 1100 (9th Cir. 2014) (quoting *Hill v. Astrue*, 698 F.3d 1153, 1162
3 (9th Cir. 2012). Plaintiff has not challenged the ALJ’s failure to credit fully plaintiff’s
4 allegations and testimony before this Court. *See* Dkt. 12. The ALJ provided a lengthy,
5 thorough, and well supported discussion as to why she did not credit fully plaintiff’s
6 allegations and testimony, including a discussion of many inconsistencies. *See* AR. 21-
7 24. Resolving the conflicts in the record, including those regarding plaintiff’s allegations,
8 as well as those between the different medical opinions, is best left to the ALJ in this
9 circumstance.

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11 The ALJ is responsible for evaluating a claimant's testimony and resolving
12 ambiguities and conflicts in the medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722
13 (9th Cir. 1998) (citing *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995)).

14 **(2) Whether the ALJ’s adopted RFC finding is supported by substantial**
15 **evidence in the record.**

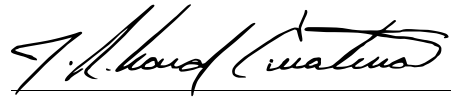
16 The Court already has concluded that the ALJ erred when evaluating the medical
17 evidence, and that the RFC did not include all of the opined limitations, *see supra*,
18 section 1. Therefore, as a necessity, the RFC must be evaluated anew following remand
19 of this matter.

20 **CONCLUSION**

21 Based on the stated reasons and the relevant record, the Court **ORDERS** that this
22 matter be **REVERSED** and **REMANDED** pursuant to sentence four of 42 U.S.C. §
23 405(g) to the Acting Commissioner for further consideration consistent with this order.
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1 **JUDGMENT** should be for plaintiff and the case should be closed.

2 Dated this 10th day of April, 2018.

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5 J. Richard Creatura
6 United States Magistrate Judge
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